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No. 82-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,

Petitioner,

—v.—

CHRISTIAN HOMES OF ABILENE, INC., and the 326th DISTRICT COURT OF TAYLOR COUNTY, TEXAS,

Respondents.

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. May Texas terminate the parent-child relationship between a concerned and competent parent and his infant out-of-wedlock daughter without demonstrating either parental unfitness or any potential harm to the child pursuant to the conclusory standard of "best interests of the child?"

2.a. May Texas apply an unfitness standard to termination proceedings involving both in-wedlock fathers and out-of-wedlock mothers, but apply a "best interests of the child" standard in termination proceedings involving out-of-wedlock fathers seeking to fulfill their parental responsibilities?

b. Does such differentiation represent unconstitutional discrimination on the basis of illegitimacy and gender?

3. May Texas require an out-of-wedlock father to satisfy a burden of proving that his child's best interests would be served by recognizing him as a "legal" as well as a biological father?

THE PARTIES

The parties to this proceeding are listed in the caption. Throughout these proceedings, the child in question has been referred to as Baby Girl S.

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OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals is reported at 628 S.W.2d 261 (Tex. Ct. App. 1982). The Texas Supreme Court denied review without issuing an opinion. The opinion of the Court of Civil Appeals as well as the Texas Supreme Court's orders denying a writ of error and denying rehearing are set forth in the Appendix to the Petition for Writ of Certiorari and the Joint Appendix filed in conjunction with this brief.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. §1257(3) to review an order of the Supreme Court of Texas entered July 14, 1982, denying rehearing of an order

denying a writ of error entered June 16, 1982. A Writ of Certiorari was issued on January 17, 1983.

CONSTITUTIONAL PROVISION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Texas Family Code §13.21. Voluntary Legitimation.

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

STATEMENT OF THE CASE

In Texas, a "parent" may not be involuntarily deprived of parental rights absent a showing of unfitness, or neglect or abandonment[1] made by clear and convincing evidence[2] at a hearing on written notice.[3] Once parental rights are terminated and a managing conservator appointed, the parent's legal relationship to the child is totally extinguished;[4] the parent has no right ever to see the child again or to object to the child's adoption by anyone else.

1/ Texas Fam. Code §15.02(1).

2/ In re G.M., 596 S.W.2d 846 (Tex. 1980).

3/ Texas Fam. Code §11.07.

4/ The child retains the right to inherit from or through its divested parent unless the court orders otherwise. Texas Fam. Code §15.07.

Texas law defines "parent" to include the father or mother of a child born of a legal marriage, the mother of a child born out-of-wedlock, and the father of a child born out-of-wedlock with regard to whom a court has entered an order of legitimation. Texas Fam. Code §11.01(3). Legitimation can take place one of two ways: a proceeding may be brought against a recalcitrant father to establish the father's obligation to support the child,[1] or the father himself may initiate the proceeding.[2] If the child's mother objects to the petition for legitimation it will be denied unless the court find that it is in the best interest of the child that the petition be granted.[3]

1/ Texas Fam. Code §13.08.

2/ Texas Fam. Code §13.21.

3/ Texas Fam. Code §13.21(c).

Absent a judicial declaration of legitimation the father of an out-of-wedlock child in Texas is not that child's legal parent, unlike the mother of an out-of-wedlock child and the mother and father of a child born in wedlock.

Petitioner Donald Kirkpatrick is the father of a little girl who is now two years old and is known to him only as Baby Girl S.[1/] Mr. Kirkpatrick and the child's mother, R.L.S., a friend of one of Mr. Kirkpatrick's sisters (Joint Appendix, "J. A.," at 155a) began a serious relationship, during which marriage was discussed (J.A. at 157a, 189a-190a), about a year-and-a-

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1/ Because of the sensitive privacy interests involved in this case, and because the record below was sealed, petitioner will refer to the child, her mother, and her mother's parents, by initials in this memorandum. See Note, Joint Appendix, at iii.

half before the child was conceived (J.A. at 118a). Both of them lived in York, Nebraska, where Mr. Kirkpatrick worked on his father's farm.

When Mr. Kirkpatrick learned that Ms. S. was pregnant, he asked her to marry him (J.A. at 190a, 204a). His parents encouraged the marriage, and offered their support (J.A. at 160a, 272a, 286a - 287a) but the parents of the young woman refused to give their consent (J.A. at 284a, 314a).

Instead, Ms. S. was sent by her parents to a maternity residence operated by respondent Christian Homes of Abilene in Abilene, Texas. Mr. Kirkpatrick offered to pay the cost of Ms. S.' care, but the offer was refused (J.A. at 224a-225a). During the time she was in the maternity home Mr. Kirkpatrick corresponded with Ms. S. regu-

larly (J.A. at 130a) and sent her money on occasion, as did Mr. Kirkpatrick's father (J.A. at 190a-191a, 194a).

During this period, Ms. S. tried to persuade Mr. Kirkpatrick to agree to have their baby placed for adoption. Mr. Kirkpatrick wavered, based on his love for Ms. S. (J.A. at 163a, 199a, 205a-206a), but decided that he could not agree to relinquish his rights to his child, notwithstanding the fact that Ms. S. was surrendering the child for adoption and had implored him to do the same. He testified as to his reason:

> Because I love my daughter, too. I couldn't let her go, too. I had to try and get her. She's my blood, and I just couldn't let her go. I want her. She's part of me, and I just got to have her.

(J.A. at 207a).

Within a month after the child was

born, Mr. Kirkpatrick began paying a hundred dollars a month into court for the child's support (J.A. at 105a-106a). On August 28, 1981, a hearing was held in district court in Taylor County, Texas, on a petition to terminate the parent-child relationship of R.L.S., brought by the Christian Homes of Abilene, and on the cross-petition of Donald Kirkpatrick for the legitimation of his daughter (J.A. at 95a-383a). At the hearing, it was stipulated by all parties that Mr. Kirkpatrick is the biological father of the child (J.A. at 106a). Ms. S.' affidavit of relinquishment of parental rights was presented to the court and she testified that she wanted Christian Homes of Abilene appointed as managing conservator so that the child could be placed in an adoptive home selected by Christian Homes.

Ms. S. also testified that she would not consent to Mr. Kirkpatrick's petition for legitimation. She stated she was opposed to Mr. Kirkpatrick's assuming custody of their daughter and that she preferred that the child be placed in a two-parent Christian family chosen by respondent because Mr. Kirkpatrick would be a single parent (J.A. at 142a-143a), would have to rely on his parents for assistance in raising the child (J.A. at 144a), she did not like the atmosphere in the elder Kirkpatricks' home (J.A. at 144a) and because Mr. Kirkpatrick might not believe in God (J.A. at 146a-147a) and smokes.[1/] She also testified

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1/ The court also learned that Mr. Kirkpatrick has epilepsy which is controlled by medication (J.A. at 255a).

Q. In your letters, R., you refer to him as being a most wonderful man, handsome, a good man, a hard worker.

A. He still is. He has good qualities, too.

(J.A. at 191a).

The court also heard testimony from petitioner's parents, Mr. and Mrs. Kirkpatrick, and from Ms. S.' parents. Each set of parents testified to why they believed it was appropriate either for their child to seek custody of the child,[1] or to surrender the child for adoption.[2] Ms. S.

1/ Mrs. Kirkpatrick testified, "[I]t's his daughter . . . . For us it's our grandchild, and we like to take care of our own. That's the way we always have been in our family." (J.A. at 252a).

2/ Mrs. S. tesified, "[A]dolescents make poor mothers . . . .[I]t's just not a time for motherhood."(J.A. at 293a) "I want my grandchild to have the best possible home
(footnote continued next page)

and her parents testified that they wanted the child raised in a "two parent Christian family." (J.A. at 151a, 177a, 323a). Two representatives of Christian Homes also testified. Nancy Miller, the executive director, testified about one conversation with Mr. Kirkpatrick, three days after his daughter had been born, in which he expressed both his love for the baby,[1/] and his uncertainty about what the right course of action would be. Jo Griffin, an adoption caseworker at Christian

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(footnote continued from previous page) that she can have." (J.A. at 295a-296a). Mr. S. testified that it would be "an impossible situation" if the child were brought back to their small community and that, therefore, his family might move (J. A. at 327a).

1/ "He was disturbed and upset . . . [H]e told me that he cared for R. and that he cared about the baby, but he wanted to do the right thing . . . . I told him that we realized that he cared about R. and that he cared about the baby and he had shown an interest in her . . . (J.A. at 341a, 343a, 344a).

Homes, testified briefly about Ms. S.' voluntary relinquishment of her parental rights.

The court also had before it a home-study on Mr. Kirkpatrick that concluded

> In my judgment, Mr. Kirkpatrick could adequately provide for his daughter's emotional, physical and financial needs should the Court grant him custody of his daughter . . .

(J.A. at 395a).

On the record, the trial judge commented

> I think that this young man here is doing a good job with his life. He is apparently working hard on that farm, and he is going to make something of himself . . . .
>
> The Court finds that this young man here would, in fact, be a proper person to have parental rights under perhaps other circumstances . . .

(J.A. at 379a).

Nevertheless, the court denied the petition for legitimation. The sole basis for doing so, contained in the court's Findings of Fact (J.A. at 85a) was

> It is not in the best interest of the child for this court to consent to the legitimation of the child by the Respondent Cross-Petitioner Donald J. Kirkpatrick.

A motion for additional findings of fact was filed by Mr. Kirkpatrick and denied by the court. (J.A. at 93a, 94a).

On appeal, the Texas Court of Civil Appeals found, inter alia, that the lower court had not abused its discretion in denying legitimation based on the best interest of the child, pursuant to Texas Fam. Code Ann. §13.21, and rejected petitioner's contention that §13.21 violates the equal

protection and due process clauses of the Fourteenth Amendment. An application for a writ of error to the Texas Supreme Court was denied, as was a motion for rehearing in that court.

On January 17, 1983, the United States Supreme Court granted Mr. Kirkpatrick's petition for a writ of certiorari.[1/]

1/Petitioner, through his attorney, has attempted to learn the present circumstances under which his daughter is living. He has been advised by counsel for respondent that the child has not been adopted, and that respondent does not wish to provide any additional information.

Petitioner's own circumstances have changed since the decision of the Texas court. In March, 1982, Mr. Kirkpatrick married. He and his wife are in the process of buying their own home and are expecting a child in July. Mrs. Kirkpatrick is a full-time homemaker and joins in her husband's desire to raise his daughter.

SUMMARY OF ARGUMENT

There can be no dispute that the relationship between parent and child involves the most fundamental of rights, which this Court has accorded the highest level of constitutional protection. Prince v. Massachusetts, 321 U.S. 158 (1944); Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982). When the state seeks to disrupt that relationship, it must do so only for the most compelling of reasons and then only in a manner which provides the parent with the procedural and substantive protections guaranteed by the due process clause. Santosky v. Kramer, supra; Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Stanley v. Illinois, 405 U.S. 645 (1972) It must also do so in a non-discriminatory manner, so as not to deprive a parent of the equal protec-

tion of the laws, Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, supra.

Petitioner, a competent and caring parent has been deprived of his right to raise his young daughter, and his daughter has been freed for adoption by strangers, solely because petitioner has been unable to convince a court that it is in his child's "best interest" to be raised by her father rather than adopted into an unknown "two parent Christian family." The use of a "best interest" standard to terminate the parent-child relationship, a standard which is inherently vague and which invites subjective and arbitrary decision-making, cannot be justified by any state interest in the well-being of children and violates petitioner's substantive due process rights. In addition, the use of such a vague stan-

dard, and the imposition of the burden of proof on petitioner, violates petitioner's procedural due process rights. Smith v. Goguen, 415 U.S. 566 (1974); Santosky v. Kramer, supra;

This vague and subjective best interest standard is applicable in Texas only to the fathers of out-of-wedlock children; all other parents can have their parental rights terminated only upon proof of unfitness, abandonment or harm to the child. Thus, the Texas statute impermissibly discriminates both on the basis of gender and illegitimacy without any compelling or substantial necessity for doing so. Caban v. Mohammed, supra; Stanley v. Illinois, supra; Mills v. Habluetzel; __ U.S. __, 71 L.Ed.2d 770 (1982).

ARGUMENT

I.

THE DECISION TO TERMINATE THE PARENTAL RELATIONSHIP BETWEEN PETITIONER AND HIS DAUGHTER PURSUANT TO TEXAS FAMILY CODE §13.21 DEPRIVED PETITIONER OF SUBSTANTIVE DUE PROCESS OF LAW; AND PROCEDURAL DUE PROCESS OF LAW.

A. Introductory Statement

In this case, Texas has severed the parental relationship between a loving and concerned father, anxious and competent to assume parental responsibilities, and his out-of-wedlock daughter solely because the father failed to persuade a judge that it would be in the "best interest" of the child to be raised by him as opposed to unknown adoptive parents. Although called a legitimation and not a termination proceeding the effect is the same: Petitioner has been totally deprived of his parental rights without any showing that a need exists for the state

to take so drastic a step and pursuant to a standard of such vagueness that it constitutes an invitation to arbitrary and subjective decision-making.

This court has never upheld any statute that countenanced the extinction of the bond between parent and child where, as in the present case, the parent was competent and eager to raise his child and where the parent-child relationship was being severed so the child could be adopted by strangers. The destruction of a parent-child relationship by the state in the absence of a factual finding of need pursuant to a vague and wholly subjective "best interest" standard which imposes the persuasion burden on the parent cannot withstand any level of constitutional scrutiny.[1/]

1/ The use of a vague and imprecise "best
(footnote continued on following page)

B. The Constitutionally Protected Nature of the Parent-Child Relationship

The Court has long recognized that the parent-child bond is of such fundamental importance to the fabric of our society that government may intrude upon it only when the state asserts a powerful justification and then only in the least intrusive manner pursuant to carefully delineated procedural safeguards. See, e.g., Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982); Armstrong v. Manzo, 380 U.S. 545

(footnote continued from previous page) interest" standard to deprive fathers of out-of-wedlock children of their parental rights, while applying a higher substantive termination standard to other parents, also deprives petitioner of the equal protection of the laws. See Point II, infra.

(1965); Moore v. East Cleveland, 431 U.S. 494 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Parham v. J.R., 442 U.S. 584 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1978); Prince v. Massachusetts, 321 U.S. 158 (1944); Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967). Pierce v. Society of Sisters, 268 U.S. 510 (1925).1/ This special level of constitutional protection has not been limited to the bonds uniting the traditional two-parent family but has protected less

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1/ Representative examples of this Court's recognition of the constitutionally protected nature of the parent-child relationship include:

> The absence of dispute concerning the fundamental nature of the parent-child bond reflect(s) this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

(footnote continued on following page)

conventional family units as well, specifically including fathers and their out-of-wedlock children. See, e.g., Stanley v. Illinois, supra; Caban v. Mohammed, 441 U.S. 380 (1979); Moore v. East Cleveland, supra.

As a preliminary matter, it is, of course, clear that the parent-child bond which merits constitutional protection is a matter of biological and psychological fact wholly independent of the artificial

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(footnote continued from previous page) Santosky v. Kramer, supra at 753 [citations omitted]

> The importance of the parent-child relationship is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Moore v. East Cleveland, 431 U.S. 494, 503 (1972). [fn. omitted]

In short, the parent-child relationship is an "intrinsic human right," Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977), antedating not only the constitution, but organized society as a whole. See also Griswold v. Connecticut, 381 U.S. 479 (1965).

"legal" labels which may be assigned to a given parent under state law. As this Court noted in Stanley v. Illinois:

> To say that the test of equal protection should be the legal rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses. 405 U.S. 645, 652 (1972) [citation omitted].

In the instant case, whether or not Texas chooses to recognize petitioner as a "legal" parent, his biological parentage is conceded by all. Accordingly, the constitutional question of whether that biological parentage may be declared a nullity by Texas cannot be avoided by a circular exercise in semantics.

On the other hand, the constitutional protection afforded the parental relationship has been pragmatically tailored to assure that technical assertions of biological parental status do not frustrate

the ability of a child to enjoy a stable and loving home. For example, if the state demonstrates that a biological parent is unfit, the state may have both a right and a duty to terminate the parental relationship. Similarly, if a biological parent fails to come forward to take responsibility for the care and nurturing of a child, the state may have both a right and a duty to provide such a child with a permanent, stable and loving home notwithstanding the nominal status of the defaulting biological parent. See Quilloin v. Walcott, 434 U.S. 246 (1978).1/ Thus, in Caban, this Court

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1/ The Court in Quilloin affirmed what amounted to the termination of parental rights of an unwed father who, in contrast to petitioner, had never sought actual or legal custody of his child but who merely sought to block legal recognition of what was a de facto family unit. The Court cautioned:

We have little doubt that the Due
(footnote continued on following page)

noted:

> In those cases where the father never has come forward to participate in the rearing of a child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. 441 U.S. at 392.

Where, however, a biological parent does immediately come forward to rear his child and where no affirmative objection to his parental fitness exists, the parent-child bond is insulated against state interference by three interrelated sets of constitutional protections: First, the substantive protection afforded by the Due

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(footnote continued from previous page)

> Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests."

Quilloin v. Walcott, supra, at 255.

Process Clause prohibits the state from extinguishing the parent-child bond in the absence of a factually-based showing of unfitness, abandonment or likelihood of harm to the child;[1] second, the procedural protections afforded by the Due Process Clause prohibit the state from extinguishing the parent-child bond pursuant to vague and conclusory standards;[2] and third, the

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1/ For the use of substantive due process to protect the family unit against undue state interference, see, e.g. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Moore v. East Cleveland, 431 U.S. 494 (1972). See also, Loving v. Virginia, 388 U.S. 1 (1967); Wisconsin v. Yoder, 406 U.S. 205 (1972).

2/ This Court has also ruled that procedural due process of law in the context of an involuntary termination of the parent-child bond requires notice and a hearing, appointed counsel when necessary and a clear and a convincing showing by the state. See Stanley v. Illinois, supra; Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, supra; Armstrong v. Manzo, supra.

protection afforded by the Equal Protection Clause forbids the state from applying differential standards for termination on the basis of sexual stereotyping or sterotyping associated with out-of-wedlock birth.[1/]

In seeking to extinguish the parental bond between petitioner and his daughter, Texas has violated all three sets of constitutional guarantees.

C. Substantive Due Process of Law Forbids Texas From Terminating the Parental Bond Between Petitioner and His Daughter Without Demonstrating a Compelling Need To Do So. The Record in This Case Makes It Clear That Texas Has Failed To Establish Any Basis in Fact for Terminating Petitioner's Relationship With His Daughter, Much Less A Compelling One.

Although disagreement exists over the precise contours of the substantive reach

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1/ Violations of petitioner's equal protection rights are discussed in Point II, infra.

of the Due Process Clause, at a minimum it forbids the government from overriding constitutionally protected interests in the absence of a genuine need to do so. Cf. Roe v. Wade, 410 U.S. 113 (1973). Where, as here, Texas seeks to extinguish a constitutionally protected relationship of the highest order, substantive due process requires it to demonstrate an interest of sufficient magnitude to justify its activity. Where a state demonstrates parental unfitness, abandonment or a danger of harm to a child, the undoubtedly compelling interest in protecting the welfare of children justifies terminating a parental relationship. When, however, the state's investigation reveals a competent parent who is anxious to assume his parental responsibilities, no substantial state interest justifies termination of a parental relationship merely because a judge (or some other official) believes

that a "better" adoptive parent may be found

Although this Court has never precisely held that a factually-based finding of unfitness, abandonment or harm to a child is a precondition to terminating a parental relationship, the Court has noted in dicta on several occasions that the parental relationship may not be severed without adequate cause. Thus, in Santosky v. Kramer, the Court noted:

> Any parens patriae interest in terminating the natural parents rights arises only at the dispositional phase, after the parents have been found unfit, 455 U.S. 767, n.17.

Similarly, in Quilloin v. Walcott, the Court noted:

> ... that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best

interest. 434 U.S. at 255.

Again, in Stanley v. Illinois, the Court noted that the state:

> registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if [the parent] is a fit father, the State spites its own articulated goals when it needlessly separates him from his family. Stanley v. Illinois, supra, 405 U.S. at 652-53.

Indeed, in Santosky, Justice Rehnquist, writing in dissent for the Chief Justice and Justices O'Connor and White, stated that the majority (consisting of Justices Brennan, Marshall, Blackmun, Powell and Stevens):

> ...probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. 455 U.S. 773, (Rehnquist, J. dissenting).

Two of the Santosky dissenters (the Chief Justice and Justice Rehnquist) had already

joined in Justice Stewart's concurrence in Smith v. OFFER, supra, which similarly condemned a "best interest" standard to "force the breakup of a natural family" as an impermissible intrusion on "the private realm of family life which the state cannot enter." 431 U.S. 816, 862-63.

Texas itself recognizes that, ordinarily, it must demonstrate such factors as parental unfitness, abandonment or a danger of harm to the child before terminating a parental relationship. Texas Fam. Code §15.02; In Interest of G.M., 596 S.W.2d 864 (Tex. 1980); In Interest of Hare, 599 S.W. 2d 856 (Tex.Civ.App. 1980). In doing so, Texas reflects the settled practice in virtually every other state.[1/] To the extent

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1/ As a recent commentator has correctly noted, "the trend is towards more specific termination statutes which satisfy procedural as well as substantive due process requirements." Note, Termination of Paren-

(footnote continued on following page)

Texas, or any other state, deviates from the "harm" standard to sever a parental bond it falls below the minimum threshold of required state interest imposed by substantive due process.

Given the inherent vagueness of a best interest standard, termination of parental rights in Texas can take place for both permissible reasons, such as the unfitness of the parent, and for impermissible reasons, such as the parent's religious beliefs.[1/] In the present case, there is

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(footnote continued from previous page) tal Rights: The Substantive Due Process Issue, 26 St. Louis U.L.J. 915, 926 (1982). While no state still uses the "best interest" standard in the context of a termination proceeding per se, the applicable state statutes are listed in the appendix to this brief.

1/ Would the decision have been different if Mr. Kirkpatrick had formally joined a church, been married, moved away from his hometown, stopped smoking, or not had epilepsy? There is no way he can know on what basis he lost his daughter or what he could have done differently to forestall that loss.

no way that petitioner, or even an appellate court, can know upon what facts the trial court determined that it would not be in the best interest of Baby Girl S to grant her father's petition for legitimation. Since there is nothing in the record establishing his unfitness, and indeed the record contains a social services report concluding that Mr. Kirkpatrick is fit to assume custody of his daughter (J.A. at 395a), it is possible that the trial court reached its decision based on petitioner's status as a single parent, the fact that he sometimes uses bad language (J.A. at 148a), the fact that he has epilepsy, or even the nature of his religious beliefs. It is also possible that the trial court reached its decision based upon a comparison between the admittedly imperfect Mr. Kirkpatrick, and the "best possible" and hypothetical two parent Christian adoptive family sought by

the child's mother and her parents (J.A. at 148a, 151a, 177a, 323a). Obviously all parents could be found wanting as measured against some hypothetical standard of perfection.

Under Texas Fam. Code §13.21 the trier of fact is left to apply his or her own subjective judgments about what is "best" for a child. The application of such subjective decision-making, in an area that is already as highly subjective as parent-child relationships, places a parent in substantial jeopardy that, as here, he may be deprived of his fundamental right to raise his child absent a showing that such a deprivation is justified by compelling necessity or even a substantial state interest.

Nothing in the record of this case comes close to demonstrating the minimum degree of potential harm to the child which

the constitution requires before a state may sever a parental bond. Cf. Thompson v. Louisville, 362 U.S. 199 (1960). In the absence of such a showing, a state may not end a relationship between a competent and loving parent merely because a judge thinks that someone else might do a "better" job of raising the child.

D. Procedural Due Process of Law Forbids Texas From Terminating the Parental Bond Between Petitioner and His Daughter (1) Pursuant to a Subjective and Conclusory Standard Which Is Unconstitutionally Vague and Overbroad; and (2) In a Proceeding in Which Petitioner Bears the Burden of Proof.

1. The Best Interest Standard Is Unconstitutionally Vague and Overbroad.

As the record in this case and the previous discussion illustrate the best interest standard is both vague and overbroad. A "best interest" standard can mean anything and must necessarily vary from

judge to judge "leaving determinations unusually open to the subjective values of the judge." Santosky, supra, 455 U.S. 762, 71 L.Ed.2d at 612. Termination under a best interest standard may, therefore, take place for perfectly permissible reasons, such as parental unfitness, abandonment or danger of harm, or for impermissible reasons ranging from racial or religious bias to cultural rigidity. See Point I (C), supra. See generally Thornhill v. Alabama, 310 U.S. 88 (1940); NAACP v. Button, 371 U.S. 415 (1963)

Not surprisingly, therefore, the best interest standard provides no objective guidance whatever to the judges and other officials vested with responsibility for enforcing it or to persons against whom it

is applied.[1/] Accordingly, it violates all three of the policies which underlie the void for vagueness doctrine. See generally Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960).

First, a best interest standard fails to "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).[2/] Were petitioner to have scrutinized the Texas statutes governing this case and the decision of the trial court, he would have been utterly unable to

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1/ It is not necessary to discuss the vagueness and overbreadth issues separately since it is the inherent vagueness of the best interest standard which gives rise to its overbroad application.

2/ The "notice" aspects of the vagueness doctrine flow from Lanzetta v. New Jersey, 306 U.S. 451 (1939).

ascertain what behavior Texas found objectionable. In effect, petitioner has lost his child without ever having been told why.

Second, the best interest standard "impermissibly delegates basic policy matters to...judges and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, supra; Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972), Smith v. Goguen, 416 U.S. 566 (1974); Colautti v. Franklin, 439 U.S. 379 (1979).[1/] The wholly conclusory nature of the best interest standard virtually invites arbitrary, unequal and discriminatory application of the law---arbitrary, in that the purely subjective nature of the standard is

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1/ The excessive discretion aspect of the vagueness doctrine is traceable to Connolly, Comm'r. v. General Construction Co., 269 U.S. 385 (1926).

incapable of objective application; unequal, in that the standard of necessity may vary radically from judge to judge; and discriminatory in that it encourages subjective prejudice and stereotypical thinking.

Third, the best interest standard, by vesting judges with a form of codified discretion, impermissibly delegates policy-making authority to the judiciary. Where, as here, a law impinges on a constitutionally protected value, classic separation of powers analysis insists that policy be articulated by a legislative body. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See generally Neuborne, Judicial Review in France and the United States, 57 N.Y.U.L. Rev. 363, 412-419 (1982).

While reasonable persons may occasionally differ as to the degree of precision required of a statute in a given context, a best interest standard fails to satisfy

even the most permissive standard of legislative specificity. Indeed, this Court has repeatedly noted the insuperable vagueness problem posed by a best interest standard.

In Smith v. OFFER, supra at 835, n. 36, this Court noted that "judges...may find it difficult, in utilizing vague standards like 'the best interest of the child' to avoid decisions resting on subjective values."

In Bellotti v. Baird, 443 U.S. 628, 655-56 (1979), four members of the Court (Justices Brennan, Marshall, Stevens and Blackmun) noted that a best interest

> Standard provides little real guidance to the judge...(whose) decision must necessarily reflect personal and societal values and mores whose enforcement is fundamentally at odds with privacy interests.

In Sandosky v. Kramer, supra at 762, the Court noted that vague termination standards leave judges "unusual discretion to underweigh probative facts that might favor the parent."

The lower courts have also recognized the constitutional invalidity of a best interest standard for termination of parental rights.[1/] E.g. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 17-18 (S.D. Iowa 1975) aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F. Supp. 769,

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1/ The inherent subjectivity of a best interest standard has also been widely noted by scholars and commentators. See e.g., Chemerinsky, Defining the Best Interests: Constitutional Protections in Involuntary Adoptions, 18 J. of Fam. L. 79 at 105 (1979); Note, The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 Geo. L.J.213 (1979);Day,Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. of Fam. L. 213, 218 (1977); see also Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. at 649, 688-700 (1976); Note, The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication, 44 Brooklyn L. Rev. 63, 87 (1977); Note, Parens Patriae and Statutory Vagueness in the Juvenile Court, 82 Yale L. J. 745, 746-7 (1973).

780 (M.D. Ala. 1976)(3-judge court)("welfare of the child"standard invalid); In Re Five Minor Children, 407 A.2d 198, 199 (Del. 1978); ("best interest" standard invalid);[1/] State v. Robert H., 393 A.2d 1387, 1390 (N.H. 1978) ("best interest"standard invalid); Davis v. Smith, 583 S.W. 2d 37 (Ark. 1979)("Proper home" standard invalid); Linn v. Linn, 286 N.W. 2d 765 (Neb. 1980)("best interests and welfare of children" standard invalid). See

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1/ In Re Five Minor Children, supra, reached this Court under the caption Doe and Roe v. Delaware, prob. jur. noted, 445 U.S. 942 (1980), app. dism. for want of a properly presented federal question, 450 U.S. 382 (1981). The Delaware Supreme Court had declared "best interests" to be unconstitutionally vague, but sustained the termination at issue on the alternative "not fitted" standard contained in Delaware law. Doe and Roe v. Delaware raised the question whether "not fitted" represented a sufficiently definite statutory ground for termination of parental rights. This Court also granted review in the only other recent appellate case upholding "best interests" as a termination standard, Johnson v. J. O. L., cert. granted 449 U.S. 818 (1980), judgment vacated and remanded, 449 U.S. 989 (1980), but that case became moot prior to judgment.

also, Interstate Circuit Inc. v. Dallas, 390 U.S. 676 (1968)("acceptable"; "proper"; "not suitable for young persons"). See generally, Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. of Family Law 213 (1977-78); Vornholt, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, Duke Law J. 1980:336.

Since the use of a best interest standard to determine whether to extinguish a parent-child relationship violates all three policies advanced by the vagueness doctrine, this Court should reiterate the unanimous judicial rejection of the standard by invalidating Section 13.21 of the Texas Family Code as void for vagueness.

2. The Texas Proceedings Violated The Principles Set Forth In Santosky v. Kramer By Placing The Burden Of Proof On The Parent Seeking To Raise His Child.

In Santosky v. Kramer, supra, this Court held that in order to terminate a parent's rights, the state must establish its case by clear and convincing evidence. The basis for that decision was that:

> In parental rights termination proceedings, the private interest affected is commanding, the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight.

71 L.Ed.2d at 609. Texas Fam. Code §13.21 is unconstitutional under this decision for two reasons: First, it is the father and not the state or the party seeking to defeat his petition for legitimation that has the burden of convincing the court that the legitimation is in the child's best interest. Second, the concerns expressed in that case, for precise and careful fact-finding in this critically important area, are completely undermined if the substantive standard by which facts are measured, and relevant

evidence weighed, are vague and undefined. Indeed, standards this vague do not even make clear what is "relevant" at all. A statute such as Texas Fam. Code §13.21 thus renders Santosky essentially meaningless: the standard of proof the trial court must apply will not affect its decision as long as it is entirely up to the court's own, ad hoc whim to decide what must be proved. See generally, Smith v. Goguen, 415 U.S. 566, 574 (1974).[1/]

1/ As the Court explained in Goguen:

> Statutory language of such standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislators may not so abdicate their responsibilities for setting the standards of the criminal law. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 165-169 (1972). In Gregory v. City of Chicago, 394 U.S. 111, 120, Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting law-making "to the moment-to-moment judgment of the policeman on his beat."
>
> Id. at 575.

In applying a vague and subjective standard to a competent and concerned parent who seeks to raise his own daughter, Texas has severed the fundamental and highly protected relationship between parent and child without any threshold showing of necessity and in violation of petitioner's procedural and substantive due process rights.

II.

THE IMPOSITION OF DIFFERENTIAL STANDARDS IN TERMINATION PROCEEDINGS BASED UPON SEX OR ILLEGITIMACY VIOLATES THE EQUAL PROTECTION CLAUSE.

Petitioner has demonstrated that the substantive standard governing the attempt by Texas to extinguish his parent-child relationship with his daughter is both unconstitutionally permissive and unconstitutionally vague. See supra at Point I. Moreover, whatever substantive standard a state adopts to govern the termination of a parental relationship, the Equal Protection Clause requires that it be uniformly applied across the spectrum of parent-child relationships in the absence of a compelling justification for differential treatment. Caban v. Mohammed, supra; Stanley v. Illinois, supra.

In this case, Texas has quite properly adopted a rigorous standard of unfitness,

neglect or abandonment proved by clear and convincing evidence as the generally applicable test in parental termination proceedings. Texas Fam. Code §15.02(1). When, however, the father of an out-of-wedlock child seeks to accept responsibility for the rearing of his child over the objection of the mother, Texas requires the father to persuade a judge that it would be in the child's "best interest" to be raised by him as opposed to an unknown set of adoptive parents.[1/]

If such a biological father persuades the judge, he is recognized as a "legal" parent and is entitled to the full protection of Texas law. If the judge is unpersuaded,

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1/ This case does not involve a controversy between the two biological parents for custody of an out-of-wedlock child. Accordingly, it is unnecessary to consider whether a best interest standard is appropriate in such a setting. The controversy herein is between a biological father who has vigorously sought to accept responsibility for his child and an unknown set of adoptive parents.

the biological father's parental rights are denied legal recognition and his child can be placed for adoption. Thus, while most parents in Texas are measured by the "unfitness" standard, the fathers of out-of-wedlock children are subject to a far more permissive "best interest" test. Texas, therefore, differentiates on the basis of sex and illegitimacy in the choice of a governing standard in parent-child termination settings. In the absence of a compelling justification for such differentiation, the Texas practice violates the Equal Protection Clause.

A. Section 13.21 Unconstitutionally Discriminates on the Basis of Sex

It is clear that the Texas statute gives far less protection to the fathers of out-of-wedlock children than to the mothers of such children with regard to their fundamental

right to raise their children.[1/]

Just last term, this Court reaffirmed that gender-based statutory distinctions must meet:

> the burden of showing an exceedingly persuasive justification for the classification....

Mississippi University for Women v. Hogan, U.S. 73 L.Ed.2d 1090 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). A statute that explicitly allocates benefits and burdens on the basis of sex, as does Texas Fam. Code §13.21,:

> must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause.

Caban v. Mohammed, 441 U.S. 380, 388 (1979),

1/ Mothers of out-of-wedlock children quite properly are subject to the same "unfitness" standards which govern parents of in-wedlock children. Texas Fam. Code §15.02.

citing Craig v. Boren, 429 U.S. 190, 197 (1976).[1/]

The only question in this case, then, is whether the challenged Texas statute meets the test. An examination of the governmental objectives that have been or could be put forth[2/] in support of the statute

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1/ Thus, whether the level of scrutiny is characterized as one of compelling necessity because of the fundamental nature of the interests at stake, see Point I, or whether the gender-based distinction must meet the substantial relationship test, it is clear that the result in the present case is the same.

2/ This Court has:

> refus[ed] to supply a challenged rule with a rationale drawn from judicial imagination or even from the rule's history, where the rationale is not advanced in the litigation in the rule's defense.

Tribe, Constitutional Law §16.03 at 1083-1084. See generally Gunther, "The Supreme Court, 1971 Term - Foreword" In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L.Rev. 1(1973). See also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1972).

shows that Texas has sought to satisfy whatever legitimate concerns it may properly advance in far too expansive a manner and in a way that impermissibly and unnecessarily penalizes the very fathers and children whose relationships the state has an interest in protecting.

The interests advanced by Texas in support of its differing treatment of the fathers and mothers of out-of-wedlock children have been set out specifically in In Interest of T.E.T., 603 S.W.2d 793 (Texas 1980), cert. den. sub. nom. Oldag v. Catholic Charities, 450 U.S. 1025 (1980) decided subsequent to this Court's decision in Caban.[1/] Characterizing the dis-

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1/ The Texas Supreme Court upheld Texas Fam. Code §13.21 subsequent to Caban, in a decision upon which the present case is based, In Interest of T.E.T., supra. That court attempted to distinguish Caban on the ground that the Texas statute, unlike the one at issue in Caban, provides a mechanism (footnote continued on next page)

tinction between men and women imposed by the statute as "slight," Id. at 797, the Texas Supreme Court listed two objectives in justification: 1) the state's interest in distinguishing between "the father who has accepted the legal and moral commitment to the family and the father who has not done so," Id. at 797, and 2) the state's interest

(footnote continued from previous page)

by which the father of an out-of-wedlock child can achieve full parental rights, notwithstanding the mother's veto, when the father can prove that legitimation is in the child's best interest. The Texas court found this to be an "appropriately limited [distinction] between the rights of the mother and the rights of the father." In Interest of T.E.T. at 796. While it is true that under Texas law a father who has been successful in a legitimation proceeding has the same rights as the mother, and greater rights than did the father in Caban, it is also true -- and more relevant -- that the Texas father's petition for legitimation, like the pre-Caban New York father's attempt to veto his child's adoption, can be defeated based on a vague "best interest" standard that is not applied to the child's mother.

in "encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father," Id. at 797.

With regard to the first justification it is clear that the statute both sweeps too broadly and, at the same time, does not even accomplish the stated goal. A responsible father like petitioner, who sought to marry the child's mother but was refused (J.A. at 190a, 204a, 284a, 314a); who sought to contribute to the costs of the mother's pregnancy but was refused (J.A. at 224a-225a); who has done what he could to support the child by making support payments to the court (J.A. at 105a-106a); and who seeks to

provide a concededly satisfactory home and family to the child (J.A. at 379a, 395a) can be deprived of his right to raise his child pursuant to the subjective standard articulated by §13.21. Conversely, a father who refuses to support his child and has been the subject of an involuntary legitimation proceeding initiated by the mother can be deprived of his parental rights only on a traditional showing of parental unfitness under §15.02.

Thus, the Texas practice has the absurd result of treating defaulting fathers of out-of-wedlock children more favorably than fathers, like petitioner, who have done all they can to accept "the legal and moral commitment to the family." Such an irrational discrimination cannot survive any level of judicial scrutiny. Cf. O'Brien v.

Skinner, 414 U.S. 524 (1974).

More importantly, the state has far more effective ways to accomplish its goals of separating the responsible from the irresponsible father; the "sperm donor, . . . rapist, . . . 'hit and run' lover, . . . adulterer and the like," In Interest of T.E.T., supra, at 797, from "the father who has accepted the legal and moral commitment to the family . . . " Id. at 797. Any father who initiates a petition for legitimation is, by definition, seeking to establish rather than escape his legal and moral commitment. If the father is unfit or has abandoned the child, a petition can be brought to terminate his parental rights under Texas Fam. Code §15.02; there is nothing in Texas law which bars a termination petition from being heard at the same

time as a legitimation petition.[1] In short, the use of a best interest standard, as opposed to the traditional unfitness-abandonment test, is simply not necessary to further the state's interest in differentiating between fathers who should be permitted to raise their children and fathers who should not.

With regard to the state's second stated justification, it hardly encourages a mother "to properly care for the child,"

1/ §15.02(1)(H), for example, authorizes the termination of parental rights of a parent who

> voluntarily, and with knowledge of the pregnancy, abandoned the mother beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child or failed to support the child since the birth . . .

In Interest of T.E.T., supra at 797, to protect her right to give her child away for adoption by strangers when the child's own father eagerly seeks to raise the child himself. It is, of course, true that only women can bear children. Therefore, only women can decide whether or not to continue a pregnancy, and their privacy interest in full control over that decision is a fundamental one. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Once the child is born, however, other interests must be weighed in the balance. Where, as here, a mother does not assert an interest in raising her child, the state has no interest in utilizing a vague and discriminatory standard to prevent a caring father from assuming parental responsibility for his child. The state has not, and cannot, assert any le-

gitimate interest in having any child raised by strangers, even in a "two-parent Christian home" (J.A. at 151a, 177a), when the child's father is fit and anxious to provide a home for his child. Indeed, if that were the state's interest, it would be more efficiently served by depriving all parents, mothers and fathers alike, of custody of their out-of-wedlock children. Such an attempt would clearly be unconstitutional; Texas Fam. Code §13.21 is no less unconstitutional because it limits its terms to fathers.

Although not precisely articulated by the Texas Court in T.E.T., supra, the principal interest of the state in the context of an out-of-wedlock birth is assuring the child a stable and loving home. Where neither parent is prepared to accept responsibility for the nurturing of the child, the

state may, of course, extinguish parental rights under an unfitness or abandonment standard in order to make the child legally available for a stable adoptive home. When, however, the father of an out-of-wedlock child is willing and able to provide a stable and loving home, no state interest whatsoever is advanced[1/] by applying a dif-

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1/ In this case, petitioner asserted his willingness to accept responsibility for his child from the moment he learned of the pregnancy. Where the father of an out-of-wedlock child fails to come forward to accept responsibility for the child's care and nurture, no constitutional bar exists to a procedure which would free the child for adoption in a stable home. The precise requirements as to timing and notification are, of course, a matter for legislative consideration so long as they meet the requirements of the Due Process Clause. However, nothing in petitioner's argument would require out-of-wedlock children to remain in limbo while their parents decide whether to accept responsibility for them. It is only when, as here, the state uses a vague and subjective best interest standard to deprive a competent parent eager to assume his family responsibilities of his right to do so, and/or when it applies that standard only to men that a constitutional issue is posed.

ferential standard that facilitates the child's adoption by strangers.[1/]

Indeed, this Court has already determined that no state interest justifies a gender-based discrimination between the mother and father of an out-of-wedlock child. Caban v. Mohammed, supra. See also, Stanley v. Illinois, supra.[2/] In Caban, a New

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1/ Texas' practice in this regard is not widely shared. Only eight states would apply the "best interest" standard to the fathers of an out-of-wedlock child in the circumstances presented here while applying a more rigorous standard to the child's mother. Two more states deny the fathers of out-of-wedlock children any role in their children's adoption. The states' practices in this regard are set out in detail in the statutory appendix to this brief.

2/ Illinois had attempted to rationalize its double standard, by defining parents so as to exclude unwed fathers. The court quickly disposed of this attempted sleight of hand as an effort to "avoid the issue." Stanley v. Illinois, supra, at 652.

York statute permitted the mother, but not the father, of an out-of-wedlock child to veto the child's adoption. Noting that the children's father had developed a substantial personal relationship with his children, this Court held that

> the effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child.

Caban, supra at 394. The Court examined two possible justifications for the statute: the assumption that mothers have a closer relationship to their children than fathers; and the state's interest in promoting the adoption of illegitimate children that would

be disserved by providing the fathers with veto power. In rejecting both of these justifications the Court made clear that its holding applied to "loving fathers" who "have manifested a significant paternal interest in the child," Id. at 394, and not to "the father [who] never has come forward to participate in the rearing of his child . . . " Id. at 392. The majority opinion explained the limitation of its ruling: its decision did not necessarily apply to a situation in which unwed mothers might be closer than unwed fathers to their newborn infants, nor to a situation involving "the special difficulties attendant upon locating and identifying unwed fathers at birth . . ." Caban, supra, at 389, 392. However, in the present case the mother has relinquished her child for adoption; it is only the father

who seeks a relationship with his daughter. Nor does this case involve any difficulty in locating the unwed father of an infant. By its terms the statute that petitioner challenges applies only to fathers who have come forward and identified themselves.

As the dissent in Caban points out, there is a legitimate state interest in facilitating the adoption of infants whose mothers have relinquished them and whose fathers have not come forward, Caban, supra, at 399, or whose identity may be unknown. Caban, supra, at 399. However, even the reasoning applied by the dissent provides support for extending the rule in the Caban case to a father such as Mr. Kirkpatrick. In the present case, there is no countervailing state interest in adoption; the child's father wishes to raise her. There

is no question of paternity; the mother has acknowledged it and Mr. Kirkpatrick has sought legal recognition of his relationship to his daughter. He has attempted to avoid the imposition of any stigma of illegitimacy on his child by asking her mother to marry him;[1/] he attempted to provide support for the child's mother during her pregnancy; he has expressed love, concern and interest in the child both before and, more particularly, after his child's birth. He has done everything within his power to have

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1/ One of the justifications cited by three of the dissenters in Caban in support of limiting the rights of fathers of out-of-wedlock children was that the state could thereby serve its interest in discouraging illegitimate births.

> [Such a rule] gives the loving father an incentive to marry the mother . . .

Caban v. Mohammed, supra, at 407, (Stevens, J., dissenting) The fallacy in the assumption that responsible fathers need that incentive while mothers do not is apparent from the present case.

a parental relationship with his daughter and to be a true father to her.

Texas Fam. Code §13.21 treats such concerned fathers, who seek to establish rather than deny paternity and to raise their children, in a manner substantially different from mothers,[1/] even those who seek to give their children away to strangers. Accordingly, this Court's ruling in Caban v. Mohammed governs the present case, since fathers of very young children, who have acted as Mr. Kirkpatrick has, can be the kind of loving and concerned fathers whose rights are entitled to the same protections as those afforded mothers. As in Caban, the sexual stereotyping which underlies the Tex-

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1/ Sex-based distinctions with regard to parental rights are nothing new in Texas. See e.g. Armstrong v. Manzo, supra.

as statute:

> excludes some loving fathers from full participation in the decisions whether the children will be adopted and at the same time enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.

Caban, supra, at 394.

The harm done to the "loving father" who has "manifested a significant paternal interest in the child," Caban, supra at 394, is patent. Less obvious but equally invidious is the harm done to women generally by perpetuation of such stereotypes. As a result, women are invariably locked into the child-caring role and unable to share child-caring responsibilities equally with men. Great harm, both psychological and social, is done to women and men who do not fit the stereotyped mold. Women are unfairly condemned by

society when they lose or relinquish custody of their children, and men disparaged when they assume primary caretaking and nurturing roles. Such stereotypes disserve both children and their parents[1/] and have been repeatedly condemned by this Court. Stanley v. Illinois, supra; Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

1/ It is increasingly the case that single fathers are assuming responsibility for their children. The number of single parent households with children under 18 that are headed by men has almost doubled in the last decade. U.S. Census Bureau, Current Population Reports, Series P-20, Number 371 Household and Family Characteristics, (March 1981). The number of children being raised by single fathers who have never been married increased by almost 400% from 1970 to 1981 to 112,000. U.S. Census Bureau, Current Population Reports, Series P-20, Number 372, Marital Status and Living Arrangements (March, 1982).

Moreover, studies show that single fathers do quite well as parents:

> [T]he degree of stability

(footnote continued on following page)

B. Section 13.21 Unconstitutionally Discriminates on the Basis of Illegitimacy.

Baby Girl S is a child who was born out-of-wedlock. One of her parents has relinquished her for adoption, but the other wishes to provide a home for her. Solely because she is illegitimate, this

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(footnote continued from previous page)
we encountered in these fathers-only homes as well as the caliber of the parent-child relationships, struck us as being unusually high. I. Victor and W. Winkle, Fathers and Custody, 162, (1977). See also P. Chang and A. Deinard, Single-Father Caretakers: Demographic Characteristics and Adjustment Processes, 52 American Journal of Orthopsychiatry, 236 (1982); D. Orthner and K. Lewis, Evidence of Single Father Competence in Child Rearing, 13 Family Law Quarterly 27 (1979); K. Lewis, Single Father Families: Who They Are And How They Fare, 52 Child Welfare 643 (1978); D. Ortiner, T. Brown and D. Ferguson, Single Parent Fatherhood: An Emerging Family Life Style, 25 The Family Coordinator 429 (1976); H. Mendes, Single Fathers, 25 The Family Coordinator 439 (1976).

child is being deprived of her fundamental right to a relationship with a caring natural parent, by virtue of the operation of Texas Fam. Code §13.21.

It is clear that the right to a family relationship is a reciprocal one, of equal significance to parent and child.[1/] Moreover, the state has no legitimate interest in interfering in that relationship, absent a showing of compelling necessity. See Point I supra.

Nevertheless, in Texas legitimate children have a right to a relationship with their biological fathers absent a showing that the father is unfit or has

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1/ "[U]ntil the State proves unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. [fn. omitted]" Santosky v. Kramer, supra, 71 L.Ed.2d at 611.

abandoned them, but illegitimate children can be deprived of that right even where, as here, their mother has surrendered them for adoption.

The standard of scrutiny applied to statutory provisions that provide classifications based on illegitimacy requires that the classification bear a substantial relationship to a permissible state interest. Lalli v. Lalli, 439 U.S. 259 (1978). However, the "scrutiny 'is not a toothless one,'" Trimble v. Gordon, 430 U.S. 762, 767 (1977). This Court has recognized that

> the Equal Protection Clause requires more than the mere incantation of a proper state purpose.

Id. at 769.

The most frequent justification put forth in support of differing treatment for legitimate and illegitimate children has

been the difficulty in establishing paternity.[1/] The Court has given due deference to this concern, insofar as it has had validity in a particular instance, but otherwise has invalidated distinctions between legitimate and illegitimate children as unconstitutional.

Illegitimate children in Texas have had a particularly difficult time of it. Prior to 1973, they did not share the right of legitimate children to support from

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1/ This Court has recognized that the importance of "the creation of a parent-child relationship: between unwed father and child is so important, and that the parent and child's interest in the accuracy of the determination is sufficiently (compelling) that due process requires the state to pay the costs of blood tests relating to the establishment of paternity." Little v. Streater, 452 U.S. 1 (1981).

their fathers, Gomez v. Perez, 409 U.S. 535 (1973).[1/]

In response to Gomez, Texas enacted a statute to establish a father's support obligation, but imposed a one year statute of limitations on the filing of the proceeding. Noting the state's history of differing treatment of illegitimate children with regard to support, the Court struck down the one year limitations period, ruling that benefits must be made available in such a way as to "be more than illusory." Mills v. Habluetzel, 71 L.Ed.2d 770, 776 (1982).

Texas has made the right to a family relationship between a father and his out-

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1/ In holding such a distinction to violate the equal protection clause of the Fourteenth Amendment, this Court noted

> Those problems [concerning proof of paternity] are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.

Id. at 538.

of-wedlock child available in a similarly illusory way. Illegitimate children have a right to such a relationship but, unlike legitimate children, they can be deprived of that right, should the mother withhold her consent to legitimation, by the application of a vague and conclusory best interest standard. On the other hand, legitimate children can only be deprived of a relationship with their fathers after a specific finding of unfitness, neglect, non-support, or abandonment pursuant to Texas Fam. Code §15.02.

In evaluating statutory schemes according legitimate and illegitimate children different treatment this Court has made clear that some differing treatment may be allowed to the degree that it is substantially related to a valid state interest, Mills v. Habluetzel, supra at 777, (shorter limitations period in support suit

concerning illegitimate children permissible since proof problems are different and state has an interest in avoiding the litigation of state of fradulent claims). However, as discussed above, there are no valid state interests to which the challenged Texas statute is substantially related. While the state may have an interest in ending a child's status as illegitimate,[1/] Texas Fam. Code §13.21 affects only children whose fathers voluntarily seek to establish responsibility for them but does not apply to mothers who seek to retain custody of their out-of-wedlock offspring. If the state sought to accomplish its purpose through a statute that denied legiti-

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1/ The statute's application in this case is particularly unjust since the father sought to avoid having his child born out-of-wedlock, but the child's mother refused to marry him. (J.A. at 190a, 204a, 284a, 314a)

mation to both the mothers and fathers of illegitimate children, such a statute would clearly have a "reach far in excess of its justifiable purpose . . . " Lalli v. Lalli, supra, at 272. As the Court has said:

> [W]hen state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny [citations omitted]. The essential inquiry in all the foregoing cases is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental rights might the classification endanger?

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

Texas Fam. Code §13.21 might arguably promote the state's interest in ending a child's illegitimate status by making the child more readily available for adoption.[1/]

1/ The Texas statute does not, however, make it more likely that a child will be raised in a caring, nurturing home when, as now, the child's father and his family
(footnote continued on following page)

However, where, as here, a biological father is anxious to provide a loving home, the state has no interest in encouraging adoption.[1/] See Caban v. Mohammed, supra, at 391-392.

In this particular case, of course, petitioner seeks to do more than establish parentage. He seeks legal recognition of his relationship with his daughter, not simply to block her adoption by strangers but so he can assume custody of her and raise her himself. Solely because his

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(footnote continued from previous page) are eager to assume responsibility for her. The statute does not even make it more likely that the child will be raised in a two-parent family since mothers of out-of-wedlock children may remain single while fathers may marry.

1/ Since Texas Fam. Code §13.21 only affects the fathers of those children who voluntarily seek a relationship with their child, the state cannot argue that its vague best interest standard in any way serves the state's interest in certainty with regard to the parentage of children.

daughter is illegitimate, petitioner has been treated differently from all other parents and his child has been deprived of the opportunity to be raised by a fit and loving natural parent. The harshness of this result, which deprives illegitimate children of a fundamental right available to all other children, renders Texas Fam. Code §13.21 unconstitutional.

Conclusion

For all the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the court below and rule that Texas Fam. Code §13.21 violates petitioner's constitutional rights.

Respectfully submitted,

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Statutory Appendix

I. State Law Substantive Standards For Termination of Parental Rights

A. The termination of parental rights standard in every state presently guarantees parents some form of unfitness, abandonment, "continuous neglect," or other "harm to the child" substantive standard, father than a "best interest" standard in proceedings brought to terminate parental rights.

See: Ala. Code tit. 26 §10-3(1982); Alaska Stat. §47.10.080(c)(3)(1982); Ariz. Rev. Stat. Ann. §8-533(1981); Ark. Stat. Ann. §56-128(1981); Cal. Civ. Code §232 (1982); Colo. Rev. Stat. §19-11-105 (1978); Conn. Gen. Stat. §45-61(f)(1981); Del. Code Ann. tit. 13 §1103 (1981); Fla. Stat. Ann. §39.41(1)(f)(1)(1981); Ga. Code Ann. §74-405(1981); Haw. Rev. Stat. §571-61 (1976); Idaho Code §16-2005 (1979); Ill. Ann Stat. Ch. 37 §705-9 (1981); Ind. Code Ann. §31-6-

5-4 (1982); Iowa Code Ann. §§232.116,600 A.8 (1980);

Kan. Stat. Ann §59-2102 (1976); Ky. Rev. Stat §199.603 (1978); La. Rev. Stat. Ann. §13.1601 (1981); Me. Rev. Stat. Ann. tit. 22 §4055 (1982); Md. Ann Code art. 16 §74 (1982); Mass. Gen. Laws Ann. ch. 210 §3 (1977); Minn. Stat. Ann. § 260.221 (1982); Miss. Code. Ann. §93-17-7 (1982); Mich. Comp. Laws Ann. §712A.19A (1981); Mo. Ann. Stat. §211.447 (1982); Mont. Rev. Codes Ann. §41-3-609 (1981); Neb. Rev. Stat. §43-292 (1979); Nev. Rev. Stat. §128.105 (1973);

N.H. Rev. Stat. Ann. §170-c:5(1981); N.J. Stat. Ann. §9:2-19 (1980); N.M. Stat. Ann.§40-7-4 (1982); N.Y. Jud. Law §614(1)(e), Soc. Serv. Law §384-6, Dom. Rel. Law §111 (1979); N.C. Gen. Stat. §7A (1981); N. D. Cent. Code §§27-20-44, 14-15-06 (1974);

Ohio Rev. Code Ann. §2151.353 (1972); Okla. Stat. Ann. tit. 10 §1130 (1982); Or. Rev. Stat. §419.523 (1981); Pa. Stat. Ann. tit. 23 §2511 (1981); R.I. Gen. Laws §15-7-7 (1981); S.C. Code §20-7-1590 (1982); S.D. Codified Laws Ann. §26-8-36 (1977); Tenn. Code Ann. §37-246 (1979); Tex. Fam. Code Ann. §15.02 (1982); In re J.P., 648 P.2d 1364 (Utah 1982); Vt. Stat. Ann. tit. 33 §656 (1981); Va. Code §§16.1-283, 63.1-225 (1980); Wash. Rev. Code Ann. §13.34.190 (1981); W.Va. Code §49-6-5(6)(1980); Wis. Stat. Ann. §48.40 (1979); Wyo. Stat. §14-2-309 (1981).

B. Notwithstanding the above, several states and the District of Columbia have local statutes permitting the application of a lesser substantive standards where the question arises in the context of a parent's[1/] refusal to consent to the child's adoption. In such cases local statutes permit the court to dispense with either parent's consent upon a finding that consent is being withheld contrary to the "best interests of the child."

See: Ariz. Rev. Stat. Ann. §8-106 (1981); D.C. Code §16-304(e)(1982); Iowa Code Ann. §600.7(1981); Mass. Ann. Laws ch 210 §3 (1981); N.D. Cent. Code §14-15-19 (3)(c)(1981); Va. Code Ann. §63.1-225(c)(1980).

1/ The statutes listed here apply to either parent, regardless of sex. States where a lesser standard is applied to fathers only are listed infra at Point II.

C. However, in half of these jurisdictions, state courts have effectively eviscerated the "best interest" exception for reasons parallelling those argued by petitioner here. In three of these states, therefore, the effective rule is that a showing of unfitness or harm is always necessary where permanent termination of parental rights is at stake.

See: In Re Hyatt's Adoption, 27 Ariz. App. 170, 536 P.2d 1062 (Ariz. 1975); Custody of a Minor, 421 N.E.2d 63 (Mass. 1981); Kottsick v. Carlson, 241 N.W.2d 842 (N.D. 1976); see also Board of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799 (Va. 1972); ("detrimental to the welfare of the child" standard).

II. Differential Standards Applying to Out-of-Wedlock Fathers.

A. In dispensing with parental consent to an adoption, only ten states treat the unwed father who has established his biological paternity[1] differently from other parents.

1. Although the precise procedural context varies (i.e. overt overriding of his refusal to consent, as opposed to refusal of permission to achieve "parental" status through legitimation), seven states, including Texas, permit the adoption of an out-of-wedlock child to proceed without the consent of an available and involved natural father simply upon a finding that adoption is in the child's "best interest."

See: Ala. Code §§26-10-3, 26-11-3 (1982); Ark. Stat. Ann §56-106, 34-718 (1981); Ga. Code Ann. §24A-3202 (1982); Me. Rev. Stat. Ann. §532-C (1982); Mont. Rev.

1/ State procedures vary considerably as to the manner and time in which the father of an out-of-wedlock child may establish biological paternity and/or legitimate his child. As this case presents no question concerning the constitutional validity of these procedures, this (cont'd)

Codes Ann. §§40-6-130 (1981); Neb. Rev. Stat. §43-104.06 (1978); Tex. Family Code Ann. §13.21 (1981).

2. Two states dispense with the unwed father's consent entirely, as a matter of state statute:

Miss. Code Ann. §93-17-3 (1973); Okla. Stat. Ann. tit. 10 §§55, 60.5(2)(1982).

3. New York dispenses with the unwed father's consent when the child is placed for adoption at age six months or less and the father has not openly lived with the child or the child's mother for the six months preceding placement of the child for adoption.

NY Dom. Rel. Law §111 (1982).

B. Conversely, forty-one jurisdictions apply the same standard to unwed fathers as they do to other parents, where the unwed father has demonstrated the degree of interest and support petitioner Kirkpatrick has in this case.

(cont'd)
statutory appendix draws no distinctions as among such statutes.

See: Alaska Stat. §§25.23.050, 25.23.040(2) (1982); *Ariz. Rev. Stat. Ann. §8-106 (1981); Cal. Civil Code §§224, 7004(a)(4)(1982); Colo. Rev. Stat. Ann. §§19-1-103, 19-4-107, 19-6-105 (1980); Conn. Gen. Stat. Rev. §45-61(i)(1981); Del. Code Ann. tit. 13 §908 (1974); *D.C. Code §16-304, 16-909 (1982); Fla. Stat. Ann. §63.062 (1981); Hawaii Rev. Laws §578-2 (1977); Idaho Code §§16-1504, 1510 (1979); Ill. Ann. Stat. Ch. 40 §§1501(E), 1510(a) (1980), 31-6-631-9; Ind. Ann Stat. §§31-3-1-6 (1980); *Iowa Code Ann. §§600A.2, 600A.8, 600.7 (1981); Kan. Stat. Ann. §38-113(a)(1976); Ky. Rev. Stat. Ann. §199.500(1982); La. Rev. Stat. Ann. §§9:404, 9:422.3 (1965), LSAACC §203 (1981); Md. Ann. Code Art. 16 §§68, 72 (1981); *Mass. Ann. Laws c. 210 §2,

3, 4A (1981); Mich. Comp. Laws Ann. §710.31 (1981); Minn. Stat. Ann. §§259.21 (3), 259.24, 259.26 (1982); Mo. Rev. Stat. §453.015, 453.030 (1982); Nev. Rev. Stat. §§126.031, 126.051, 127.090 (1982); NH Rev. Stat. Ann. §170-B:5, 6 (1982); NJ Stat. Ann. §§9:3-8, 9:3-38 (1982); NM Stat. Ann. §40-7-6 (1978); NC Gen. Stat. §48-6 (1981); *ND Cent. Codes §§14-15-05, 14-15-20 (1981); Ohio Rev. Code Ann. §3107.06 (1981); Ore. Rev. Stat. §§109.092, 109.125 (1981); Pa. Stat. Ann. tit. 23 §2711, 8302 (1981); RI Gen. Laws Ann. §§15-7-5, 15-7-7, 15-7-26 (1972); SC Code Ann. §20-7-1710 (1982); SD Compiled Laws Ann. §§25-6-1, 25-6-4 (1976); Tenn. Code Ann. §§36-111, 302 (1982); Utah Code Ann. §78-30-4 (1980); Vt. Stat. Ann. tit. 15 §435; *Va. Code Ann. §63.1-225 (1980);

Wash. Rev. Code Ann §§26.26.020, 26.32.030, 26.26.040 (1981); W. Va. Code §48-4-1 (1980); Wisc. Stat. Ann. §§48.025, 48.91 (1981); Wyo. Stat. Ann. §§1-22-109, 110 (1977).

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*Although statutes with asterisks contain an unconsitutionally vague "best interest of the child" standard to dispense with parental consent in an adoption proceeding, they apply it uniformly to men and women regardless of marital status. In several instances, they have been narrowed substantially by judicial interpretation. See I, part B, supra.